

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Acceleration of Broadband Deployment:)	
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	WC Docket No. 11-59
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

COMMENTS OF THE BOROUGH OF SEWICKLEY, PENNSYLVANIA

I. INTRODUCTION

The Borough of Sewickley located in Allegheny County, Pennsylvania, files these comments in response to the Notice of Inquiry ("Notice") in the above captioned proceeding. As requested in the Notice, these comments include a description of the Borough's policies and procedures related to broadband access to the public rights-of-way ("ROW's). They also include a description of the Borough's authority under Pennsylvania law for adopting and implementing its ROW policies and procedures. Finally, the comments respond to the Commission's questions regarding possible actions it should take or not take with respect to ROW management practices. These comments do not address wireless facilities siting issues, except as they relate to wireless facilities in the ROW's.

The Borough strongly supports the Commission's policy objective of expanding broadband deployment throughout the nation. We also share the Commission's view that ROW access by broadband providers must be on fair and reasonable terms through a predictable and timely process. The record below demonstrates that the Borough's ROW policies and procedures place minimal cost and require minimal effort by broadband providers, are fully transparent, and result in prompt disposition of permit applications. In short, the Borough is not an obstacle to broadband access to the ROW's. The Borough strongly opposes, therefore, any effort on the part of the Commission to adopt guidelines or promulgate rules that address municipal ROW practices or fees. Any such attempt would amount to a solution in search of a problem.

In addition, the Borough's ROW management practices reflect multiple underlying policy interests of the Borough. Whether those interests are public safety, physical maintenance of the streets and roads, protection of the Borough's own facilities in the ROW's or control of traffic disruption, the Borough must balance these interests with the interests of private occupants of the ROW's. This balancing of interests reflects the individual and unique conditions of our roads and our local community. A "one size fits all" regulatory regime imposed on a national scale would undermine these local interests, would be harmful to

broadband deployment and simply would not work as applied to thousands of diverse communities throughout the nation.

II. MUNICIPAL RIGHT-OF-WAY POLICIES

A. Timeliness and Ease of Permitting Process

A broadband provider that wishes to install aerial wires and/or other equipment in the ROW's is not required to obtain a permit from the Borough. Should the provider wish to install wires and/or other equipment underground, however, it would first have to contact the Borough Building and Zoning Office to learn about its permitting process. The Code Enforcement Officer would then provide the applicant with a copy of the Borough's Street Opening Application and corresponding Street Opening Procedures and Guidelines. This same application is used for any type of company doing work in the Borough streets. The Borough also has a Street Excavation Ordinance #1271, which was most recently revised in November of 2008. The Ordinance sets forth the Borough's policies with respect to work done in the Borough's streets, and prescribes the requirements that are also explained in the permit and corresponding guidelines. All of these documents are accessible on the Borough's website, as well. If the proposed work is to be done in the Borough's sidewalks, no permit is required; therefore, no application need be submitted.

The items required at the time the permit application is submitted are clearly delineated in the street opening guidelines. The requirements are few and include: a completed application, a certificate of workers compensation insurance with the Borough, proof of surety bond, and a commitment that the applicant will arrange for an inspection of the work site by the Borough's Public Works Foreman both prior to patching up the opening and again after resurfacing. If the Code Enforcement Officer believes that the proposed work will have a deleterious effect on traffic patterns, she also requests the applicant to contact the Borough Police to insure that the necessary traffic obstacles have been contemplated. As stated in the street opening procedures and guidelines, permit applications must be reviewed within five (5) days of the submitted application. The Borough has no reason to hold-up permit approvals except in the rare instance that an application is incomplete. Should this occur, the missing items are described to the applicant so that the deficiency can be remedied. In short, the Borough's permitting process is clean, straight-forward, and prompt.

B. Reasonableness of Charges

Sewickley Borough has a published Fee Schedule which is periodically reviewed by the administration. This fee schedule was most recently reviewed and updated in 2009. Prior to that time, the Borough charged fees based on the square footage of the opening. Since then, the Borough has moved to a one-time, \$250 flat-fee for any applicant regardless of the size of the opening. This fee is to be paid at the time the application is submitted. There are no additional or recurring fees that the Borough charges based on work in its rights-of-way. As demonstrated above, the Borough's ROW fees are minimal and reasonable.

C. Non-Discriminatory Treatment

The Borough treats all occupants in its rights-of-ways similarly. Its Street Excavations Ordinance (#1271) applies to "any person or entity [who makes] an opening or excavation of any kind of street in the Borough of Sewickley". For the most part, the Borough does not own its own utility poles or street lights in the ROW's, and does not require a permit for aerial occupancy in the ROW.

D. Policy Goals and Any Industry Complaints

It is essential for the Borough to have well-defined right-of-way practices in place in order for it to maintain streets and roads in good condition. First and foremost, this is essential for public safety. With multiple wires, pipes, poles, pedestals, and other equipment in the ROW's, managing the ROW's to prevent safety hazards is critical. Safety is also an important issue with respect to traffic disruption when utilities work in the ROW's. Second, the Borough has an interest in protecting its own facilities in the ROW's, including but not limited to, traffic signals, sewer facilities, and storm drainage basins. Finally, the Borough has a strong public policy goal of maintaining the ROW's in good condition to protect a key municipal asset.

The Borough is not an obstacle to companies that wish to do business and provide services within the Borough; however, it has a responsibility to insure that whatever work is done, is done with regard for the physical condition and safety of the roadway. The Borough has not experienced any problems with its existing application process nor has it received any complaints regarding its process or its fees.

III. MUNICIPAL RIGHT-OF-WAY AUTHORITY IN PENNSYLVANIA

Under Pennsylvania law, Sewickley Borough is governed by the Pennsylvania Borough Code (53 P.S. § 45101 *et. seq.*). Boroughs, which are generally smaller than cities, have been incorporated as such and have a population of at least 500 residents. They utilize a Mayor-Council form of government. Pennsylvania statutes, in general, and the Borough Code more specifically, provide Sewickley Borough with substantial and broad regulatory authority over its rights-of-ways. They also require that Sewickley approaches its right-of-way management in a competitively neutral and non-discriminatory manner.

Section 46202 of the Borough Code vests enumerated powers in a Pennsylvania Borough and authorizes it to enact ordinances to exercise those powers. Incorporated within this exercise of power is the authority to provide for their enforcement and to prescribe penalties for the violation thereof. There are two specific powers in this Section whereby the Borough derives much of its authority over the ROW's. First, the Borough has broad police powers that allow it "...To make such regulations as may be necessary for the health, safety, morals, general welfare and cleanliness and the beauty, convenience, comfort and safety of the borough." 53 P.S. § 46202(6).

ROW management falls within these broad police powers. More specifically, within the corporate powers granted to Boroughs, ROW authority is clearly delineated. This ROW authority includes the general authority to regulate streets. The Borough has the power:

To regulate the streets, sewers, public squares, common grounds, sidewalks, curbs, gutters, culverts and drains, and the heights, grades, widths, slopes and construction thereof; and to prohibit the erection of construction of any building or other obstruction to the convenient use of the same. (53 P.S. § 46202(17)).

In addition to the powers that Sewickley derives from the Borough Code, it also has specific statutory powers with respect to public utilities which are applicable to all municipalities in Pennsylvania. Section 1991 of the Municipal Code, entitled "Use of Streets by Public Utilities" provides in pertinent part:

The proper corporate authorities of such municipality shall have the right to issue permits determining the manner in which public service corporations...shall place, on or under or over such municipal streets or alleys...pipes, conduits, telegraph lines, or other devices used in furtherance of business; and nothing herein contained should be construed to in any way affect or impair the rights, powers, and privileges of the municipality in, on, under, over or through public streets or alleys of such municipalities, except as herein provided.

53 P.S. § 1991. The operative part of this section is that municipalities have the legal right to issue permits to public utilities.

A similar right for all Pennsylvania municipalities with respect to public utilities is found in the Pennsylvania Business Corporation Law. Section 1511, entitled "Additional Powers of Certain Public Utility Corporations," primarily provides public utilities with the right to condemn property for utility-related purposes. Subsection (e) of the section, however, outlines the rights of utilities to use the streets and the parallel rights of municipalities to regulate that use. It states, in pertinent part, that "[b]efore entering upon any street, highway or other public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the governmental authority having responsibility for the maintenance thereof." 15 Pa. C. S. § 1511(e)

In sum, the Borough has well established legal authority over the streets and roads within its jurisdictional boundaries. This includes its general police powers to adopt ordinances for the management of the Borough and for the safety and welfare of its residents. It also provides the authority to regulate all activity within its ROW's, which includes the authority to require permits and to assess fees. This authority applies to all occupants of the ROW, including broadband providers.

IV. THE COMMISSION SHOULD NOT REGULATE LOCAL RIGHT-OF-WAY MANAGEMENT

A. Introduction

Sewickley Borough supports the Commission's policy objective of expanding broadband deployment throughout the nation and throughout our Borough. We agree that broadband technology and services promote economic development and vastly improve education,

healthcare and other critical services. In addition, broadband competition has the potential to lower rates and improve customer service for our residents. For that reason, we have encouraged and welcomed broadband deployment and competition in our community.

The Borough also shares the Commission's view, as expressed in Paragraph 4 of the Notice, that access by broadband providers to the ROW's must be on fair and reasonable terms through a predictable and timely process. For that reason, the Borough has developed a regulatory structure, as described above, that places minimal cost and requires minimal effort by broadband providers, that is fully transparent and that results in prompt disposition of applications. The Borough has developed an expertise in managing occupants of the ROW's in a manner that reflects the particular, local conditions of the community.

The Borough strongly opposes, therefore, any effort on the part of the Commission to adopt policy guidelines or rules that address municipal ROW practices or fees. There is no evidence whatsoever that the Borough's ROW policies or practices discourage broadband deployment. On the contrary, the Borough's policies encourage broadband deployment. This is not only illustrated by the Borough's ROW management practices, as described in Section II above, but also by the fact that there have been no known complaints by broadband providers regarding these practices. If there was a problem, the providers no doubt would have brought it to the attention of the Borough. This has not occurred.

The purpose of the Notice is to explore "specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights-of-way..." (NOI ¶10). Based on the Borough's ROW practices with respect to broadband providers and its legal authority for managing the ROW's described in Section III above, the Borough poses no obstacle to broadband deployment. We urge the Commission, therefore, not to attempt to regulate, through new rules, guidelines or other mandatory mechanisms, local management of the ROW's.

B. Right-of-Way Procedures and Fees

The Notice asks for a detailed description of the Borough's broadband policies and procedures with respect to the ROW's. Section II above demonstrates that the Borough's ROW regulations are neither complicated nor obtuse. They are straightforward and easily accessible. The information requested from broadband providers relates only to the company's physical use of the ROW's. There is no discriminatory treatment among broadband providers—either wired or wireless. In addition, ROW permit applications are processed in a timely fashion and permits are issued promptly.

The fees charged by the Borough for ROW permits are fair and reasonable. The Borough is aware that municipalities throughout the country typically elect one of two methods for determining ROW management fees—the "value method" or the "cost method." By "value method" we mean the market value of the ROW as customarily assessed as a percentage of the provider's gross revenues. This is the statutorily permitted method, of course, for determining franchise fees from cable operators for use of the ROW's. *See* 47 U.S.C. § 542. This is also a legitimate method for municipalities to employ with respect to broadband providers and most closely approximates the actual value of the property that the municipality holds as a public trust.

The “cost method”, on the other hand, is based on the municipality’s actual costs in managing the ROW’s. These costs necessarily include the Borough’s direct operating costs (including, but not limited to, personnel time in permitting and inspections), indirect operating costs (including, but not limited to, support functions for ROW management), capital costs (including, but not limited to, equipment, computer hardware and software) street degradation costs (the reduction in street life due to excavations), etc. The Borough’s current ROW-related fees are significantly lower than the fees that would be assessed by both the “value method” and the “cost method.”

C. Policy Goals and the Need for Local Control

The policies underlying the Borough’s ROW practices are myriad and reflect the multiple public policy interests of the municipality. These interests must be balanced with the interests of the private occupants of the ROW’s to achieve an effective regulatory structure. The first and foremost goal is public safety. It is critical that the wires, pipes, poles, pedestals and other equipment in the ROW’s are installed and maintained in a safe manner. By way of example, there have been at least two recent incidents in Pennsylvania in which communications company contractors pierced gas lines in the ROW that resulted in personal injury and destruction of property. This occurred in Hempfield Township in Westmoreland County on March 22, 2000 and in Moon Township in Allegheny County on March 16, 2005.

Second, the Borough has a strong interest in maintaining its streets and roads in good condition. The public ROW’s are one of the most important assets of any municipality and must be properly maintained. The streets and roads of different municipalities are completely different from each other, depending on such factors as terrain, the time period in which they were constructed, whether they have sidewalks, the density of the residential or commercial corridor, etc. For municipalities in the Northeast/Midwest, ROW maintenance can be especially challenging during harsh winters.

Third, the Borough has an obligation to protect and maintain its own facilities in the ROW’s. These include, but are not limited to, traffic signals, water and sewer facilities, storm drainage basins, etc. These facilities must reside in close proximity with the equipment and facilities of the other occupants of the ROW’s. Finally, it is important that vehicular traffic disruption be safely controlled during installation or maintenance of communications facilities.

In short, the Borough must balance multiple ROW public policy goals that reflect the particular conditions of the Borough. These goals apply not only to broadband providers, but also to telephone, gas, electric, water and other providers. These goals are inherently local and reflect the individual and unique conditions of our roads and our local community. They are inconsistent with the Commission’s national perspective. While the Borough embraces the goal of broadband expansion and has adopted minimal and reasonable regulations for broadband access to the ROW’s, it must balance this goal with its own local interests. A “one size fits all” regulatory regime imposed on a national scale simply will not work. It will undermine these local interests and harm broadband deployment, causing extensive delays as municipalities attempt to integrate a national template into its local practices.

D. The Commission Should Not Interfere With Local Right-of-Way Management and Should Take Action to Preempt Pennsylvania's Municipal Broadband Prohibition

The Borough's ROW practices as outlined in Section II above are reasonable and flow from the legal authority granted to it by the Commonwealth of Pennsylvania as outlined in Section III above. They do not present any obstacle to broadband deployment. As such, the Borough strongly opposes any effort by the Commission to engage in rulemaking or adjudication with respect to municipal ROW management or fees.

In response to the specific questions posed in the Notice regarding "Solutions" (Notice, ¶¶34-50), the Borough could potentially support and participate in Commission sponsored educational efforts and voluntary activities (¶37) as well as the compilation of best/worst practices (¶38). Any efforts to adopt policy guidelines (¶46), promulgate rules (¶47), make recommendations to Congress (¶44) or establish Commission sponsored mediation (¶42), however, would be an unnecessary and harmful interference with local ROW management.

Having said this, a law in Pennsylvania that is a genuine obstacle to broadband deployment is the prohibition against municipal broadband deployment embodied in Chapter 30 of the Pennsylvania Public Utilities Code. Specifically, Section 3014(h) states that political subdivisions (generally municipalities or counties) are prohibited from offering broadband services to the public for compensation. 66 Pa. C.S. § 3014(h). The only exception is if the municipality or county submits a written request to the incumbent local exchange carrier (ILEC), and if the ILEC decides not to deploy the requested broadband service (at the requested data speeds) in that jurisdiction.¹

This conditional prohibition on community broadband has had a major "chilling effect" on broadband deployment in Pennsylvania. A large portion of Pennsylvania is comprised of rural communities, and many providers appear to have decided, presumably after performing a cost-benefit analysis, not to deploy broadband in many of these communities. As a result, these communities often have slow and substandard internet service that stymies economic development and impedes advances in education, healthcare and other services.

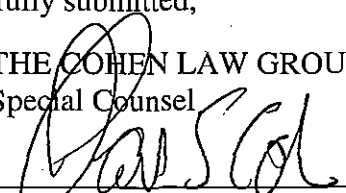
The Commission is well aware of the rapid growth of community broadband networks throughout much of the nation. With rare exceptions, however, the deployment of such networks is effectively barred in Pennsylvania. We strongly urge the Commission to take the appropriate

¹ If the ILEC agrees to provide the requested broadband service, then it must do so within 14 months of the receipt of the request from the municipality or county. Id.

steps, through either regulation or recommendation of legislation, to preempt the prohibition of municipal broadband networks in Pennsylvania and similarly situated states.

Respectfully submitted,

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